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Supreme Court U.S.
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No. 10-537

IN THE
Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Rather than refute the need for this Court's review of the proper legal test for discerning clear congressional intent, which is the question actually presented by the petition, the Acting Solicitor General's brief reformulates the question presented almost beyond recognition, and then devotes itself to addressing why *its* question, which focuses heavily on tax immunity, does not warrant review. *Compare* Pet. i, *with* SG Br. i. That effort, however, just compounds the confusion in the law and the need for this Court's review.

First, the Acting Solicitor General's attempt to minimize the conflict in courts' legal standards rests upon an analytical framework that departs from the United States' own prior briefs to this Court and their discussions of the legal rules governing the disestablishment inquiry.[1] Given, moreover, that the United States does not dispute that explicit congressional direction is lacking in this case and given the Executive Branch's repeated recognition for a century of the Reservation's continued existence (including within entire portions of the Code of Federal Regulations, 25 C.F.R. Parts 177, 180, 204),

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[1] *See* U.S. Amicus Br. at 9, 23-24, 28-29, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1993) (No. 96-1581); U.S. Cert. Br. at 13-17, *Dauggard v. Yankton Sioux Tribe*, Nos. 10-929, *et al.* (analysis governed by statutory text, subsequent statutory enactments, and negotiating history, with only one confirmatory sentence referencing tribal activity).

the brief exacerbates the legal disarray by putting the federal government on both sides of the dispute over what factors, if any, predominate in "clear" congressional intent determinations.

Second, the Acting Solicitor General's opining about petitioner's tax immunity claim compounds the problem because withdrawal of such immunity requires its own clear statement of congressional intent, just like the disestablishment inquiry. Yet the government's brief cites no clear or unequivocal congressional direction regarding Osage income tax immunity either. Whether such clear statements must be anchored in statutory text and unequivocal legislative history, as the government has pressed in other cases and the Seventh, Eighth, and Ninth Circuits have held, or can rest dispositively on post hoc extra-legislative inferences is precisely the question presented. Layering on yet another "clear" statement inquiry just makes a bad mess in governing law worse.

Finally, the government's argument against review never come to grips with the profound political, economic, structural, societal, and practical repercussions of disestablishment questions both to Indian tribes and to State and local governments. By its very nature, a judicial decision that exercises disestablishment power vested in the Political Branches, without unequivocal direction from either Congress or the Executive Branch (*see* SG Br. 16), and wipes away an entire reservation that Congress expressly created and the tribe itself bought and paid for, 1 Indian Aff. L. & Treaties 137 n.a (Charles J.

Kappler ed., 1902), is the type of weighty decision that merits this Court's attention.

I. THE GOVERNING LEGAL STANDARDS ARE IN CONFLICT

The Acting Solicitor General avoids the conflict in governing standards by stating the question at too general a level. The conflict is not over whether lower courts dutifully recite this Court's "clear[]" and "explicit" congressional intent rule from *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). *See* SG Br. 9-12. The problem, as history shows, is that, when given a "clear" statement rule, courts can veer into differing and contradictory legal tests for discerning that requisite "clear" congressional direction. *See Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) (courts developed differing tests to determine clear congressional intent to apply statute extraterritorially).

That is what has happened here. The Tenth Circuit held that an explicit and unequivocal statement of congressional intent that appears nowhere in statutory text or unequivocal legislative history could be discerned from post hoc academic writings, modern demographic statistics, and the tribe's mere awareness during enactment of the allotment process (SG Br. 8; Pet. App. 15a-16a). Under the Tenth Circuit's rule, those extra-governmental factors trump Congress's repeated and explicit statutory recognition of the Reservation's existence. *See* Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, §§ 4, 7, 10, 11 (1906); Oklahoma

Enabling Act, Pub. L. No. 59-234, 34 Stat. 267 (1906) (seven references to the Osage Reservation); Indian Appropriation Act of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325 (regulating trade on the "Osage Indian Reservation"); Act of Mar. 2, 1917, Pub. L. No. 64-369, 39 Stat. 969 (declaring all of Osage County, which is the Reservation, "Indian Country" for liquor law purposes); Act of May 25, 1918, Pub. L. No. 65-159, 40 Stat. 561 (regulating receipts from leases "upon the lands of the Osage Reservation").

The Seventh Circuit, in a decision that the Solicitor General (like respondents) ignores, has likewise predicated disestablishment on post-enactment non-legislative evidence and some legislative history, despite the absence of any textual anchor or unequivocal expression in legislative history. *See Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657, 665 (7th Cir. 2009). So too has the South Dakota Supreme Court afforded "persuasive bearing" to a post-legislative "change in regional character" in finding disestablishment despite "uncertain" textual support. *Bruguier v. Class*, 599 N.W.2d 364. 375 (S.D. 1999).

Other courts of appeals have held, however, that Congress's words, plain statutory text, and unequivocal legislative history carry predominant weight in discerning a "clear" and "explicit" congressional intent on such an acutely political question as disestablishment. In the Second, Eighth, and Ninth Circuits, unless the statute is itself textually equivocal and contradictory—not just silent—disestablishment cannot be grounded in the

same types of external, non-legislative or post hoc indicia that the Tenth Circuit here held were dispositive. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), cert. pending, Nos. 10-929, 10-931, 10-932, 10-1058; *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 158 n.6 (2d Cir. 2010), *cert. granted*, No. 10-72, *cert. dismissed* (Jan. 10, 2011); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000).

The Solicitor General says (SG Br. 13) that those differences in outcomes are simply the product of "different factual records before each court." But the same factual setting has produced flatly contradictory rulings concerning the *same reservation* precisely because of the conflicting legal rules for whether and how congressional intent is made "clear." *Compare Bruguier, supra* (Yankton Sioux reservation disestablished based on post hoc changes, despite the absence of unequivocal text or legislative history), *with Yankton Sioux, supra* (Yankton Sioux reservation not disestablished due to absence of clarity in statutory text and legislative history, as confirmed by Executive Branch practice).

Likewise here, the Tenth Circuit's legal standard found "clear" evidence of disestablishment even though (i) Congress has, in five separate statutes, expressly acknowledged the Reservation's continued existence; (ii) a broad cross-section of Executive Branch agencies have long recognized its existence, Pet. 22-25; and (iii) the Acting Solicitor General acknowledges that the evidence of disestablishment is "unclear" (SG Br. 16) and thus that this Court's

"clear" statement test has not been met. That sharp contradiction between the court and the Political Branches cannot be chalked up to misapplying law to facts (*see* SG Br. 14). Rather, the Tenth Circuit got the legal rule wrong at the outset, turning a mandate for genuinely "clear" and "explicit" *congressional* intent into a license for *judicial* conjecture unhinged from Political Branch direction.

Indeed, petitioner's point is the same as that advanced by the Solicitor General in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). There the United States was explicit that *Solem's* clear-statement requirement, as a matter of law, should give predominant weight to statutory text and that, when statutory text is silent or ambiguous, courts cannot ground Congress's "clear" statement in extra-congressional, extra-governmental, post hoc materials. "[E]vents surrounding the passage of a surplus land act * * * rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is *silent or ambiguous*." U.S. Br. at 9, *Yankton Sioux*, *supra* (No. 96-1581) (emphasis added); *contrast* SG Br. 12. The occasional lapses or inconsistencies in Executive Branch treatment relied upon by the Acting Solicitor General in this case, *compare* SG Br. 18-19, *with* Pet. 5, 22-27 (citing extensive Executive Branch recognition of the Reservation), were declared by the Solicitor General to be "of no help" in documenting disestablishment unanchored in statutory text or unequivocal legislative and negotiating history in *Yankton Sioux*. U.S. Br. at 24, *Yankton Sioux*, *supra* (quoting *Solem*, 465 U.S. at 478). And again, the

Solicitor General said before that "isolated floor statements * * *" especially *when no such references appear in the text of the Act* itself, shed little light on the diminishment question." U.S Br. at 22, *Yankton Sioux*, *supra*; *contrast* SG Br. 12, and Pet. App. 16a.

Indeed, the central theme of the United States' *Yankton Sioux* brief is that certain factors in the clear-statement inquiry predominate and, more specifically, that other disestablishment indicia cannot trump "countervailing evidence from Congress and the Executive Branch," U.S. Br. at 28, *Yankton Sioux*, *supra*. That is precisely the question raised by the petition in this case. Whether right or wrong, petitioner's and the Solicitor General's (prior) view of the predominating factors under the clear-intent test, and the rules for disestablishment enforced by the Second, Eighth, and Ninth Circuits are *legally* irreconcilable with the entirely extra-congressional and extra-governmental analytical model of "clear" congressional intent enforced by the Tenth Circuit here (and the Seventh Circuit and South Dakota Supreme Court). If the Acting Solicitor General no longer believes that there should be consistent legal rules about how "clear" congressional intent is made clear and when "countervailing evidence from Congress and the Executive Branch" will predominate, *ibid.*, that change in position simply muddies the waters more. Given how frequently the question arises (*see* Pet. Reply Br. 1-2), and the importance of the disestablishment test to States, local jurisdictions, and tribes, this Court's review is needed.

II. THIS CASE SQUARELY PRESENTS THE QUESTIONS FOR REVIEW

Because of its stark disregard of repeated and express statutory recognition of the Reservation by Congress and Executive Branch regulations and other official statements, Pet. App. 19a, the Tenth Circuit's decision encapsulates the divide in governing legal standards for disestablishment and the predominance (or not) of evidence from the mouths of Congress and the Executive Branch. The Acting Solicitor General's contention (SG Br. 15) that this case is not the best vehicle for resolving that conflict cannot withstand scrutiny.

1. The Solicitor General first notes (SG Br. 15) that "Oklahoma tribes have an anomalous statutory and historical backdrop." That is quite beside the point. Whatever the statutory or historical tribal differences, this case is about the legal rules for establishing *Congress's* clear intent and those rules should be the same for the full spectrum of cases arising across the United States.

Indeed, the Acting Solicitor General's brief does not remotely suggest that the test for congressional intent should vary from State to State. Quite the opposite, the *Murphy* brief that the Acting Solicitor General cites (SG Br. 16) applied the same legal framework advocated by petitioner here (and advocated by the Solicitor General in *Yankton Sioux*). In *Murphy*, the Solicitor General argued that it was a series of "[s]tatutes enacted" by Congress, subsequent legislation expressly referencing disestablishment,

and the "settled" position of the Executive Branch that demonstrated congressional intent to disestablish another Oklahoma reservation. U.S. Br. at 17, 19, 20, *Murphy v. Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787). So the fact that this is an Oklahoma case is irrelevant because a single governing legal test for discerning clear congressional intent should still apply. And the test propounded by the Solicitor General in *Murphy* bears no resemblance to the legal test applied by the Tenth Circuit here, where statutory text, subsequent enactments, and longstanding Executive Branch regulations and official documents have repeatedly acknowledged the Reservation's continued existence.

2. The Acting Solicitor General also argues (SG Br. 16-22) that review is not warranted because petitioner's underlying tax immunity claim is mistaken. Whether Congress expressly consented to state taxation of individual tribal members' income, however, is a quite distinct question from whether the Reservation has been disestablished. Indeed, it is only if a Reservation exists in the first place that Congress would need to address and authorize such taxation.

In any event, the argument simply confuses matters more because a "clear" statement of congressional intent is also required for States to tax reservation Indians on income earned on the reservation. "States may tax Indians only when Congress has manifested clearly its consent to such taxation." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see Oklahoma Tax Comm'n v. Sac and*

Fox Nation, 508 U.S. 114, 126 (1993) ("Congress [must] expressly authorize[] tax jurisdiction in Indian Country."); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973) ("Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.") (quoting U.S. Dep't of Interior, *Federal Indian Law* 845 (1958)).

The government's entire argument thus repeats, rather than avoids, the foundational question of how such express congressional intent can be discerned apart from express statutory text and unequivocal legislative history. With respect to the Osage, there is no textual, structural, or unequivocal legislative history directive that would overcome the background rule that States may not "tax a reservation Indian for income earned exclusively on the reservation." *McClanahan*, 411 U.S. at 168. Indeed, contrary to the Acting Solicitor General's argument (SG Br. 19-22), this Court's precedent has extended traditional tax immunity rules to Osage members. *See McCurdy v. United States*, 264 U.S. 484, 485-486 (1924) (Osage Indians immune from taxation of allotted lands held in trust by the United States, based on general rules of Indian tax immunity); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522, 523, 529-530 (1916) (tribal lease "in the Osage Reservation" not subject to state taxation), *overruled on other grounds, Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 366 (1949) (noting subsequent congressional authorization of lease tax); *cf. West v. Oklahoma Tax Comm'n*, 334

U.S. 717, 725-727 (1948) (applying general precedent to the Osage).

To be sure, this Court has held that Osage members who received certificates of competency are subject to taxation on headright income. *See Choteau v. Burnet*, 283 U.S. 691, 695 (1931); *Leahy v. State Treasurer of Okla.*, 297 U.S. 420 (1936). But that is because Congress expressly authorized such taxation. *See* Osage Allotment Act § 2 (Seventh) (Pet. App. 62a) ("[U]pon the issuance of such certificate of competency the lands of such members shall become subject to taxation."); *see also Choteau*, 283 U.S. at 695 ("petitioner has therefore been taxable upon his allotted lands" since receiving a certificate of competency). *Leahy*, in turn, adopted *Choteau*'s reasoning. 297 U.S. at 421.

That precedent proves the opposite of what the Acting Solicitor General argues. If Congress had already broadly withheld traditional tax immunity from the Osage, then there would have been no reason for Congress to have subjected Osage members to taxation of headright income in the Osage Allotment Act. Such a targeted carve out of tax immunity, in other words, proves that the background rule of immunity governs unless and until Congress acts.

This Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), underscores that conclusion. It is of course true that *County of Yakima* "concerned the *General* Allotment Act, not the *Osage*

Allotment Act." SG Br. 21. But the point is irrelevant. *County of Yakima* recognized that, when clear congressional intent is required, courts cannot extend *in personam* jurisdiction over the descendants of original allottees because doing so would exceed the "literal coverage" of the relevant statute, 502 U.S. at 262, and thus would contradict this Court's "consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear,'" *id.* at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765). The same principle applies here. Because the "literal coverage" of the Osage Allotment Act extends only to original allottees with certificates of competency, the Act does not contain an "unmistakably clear" congressional intent to permit taxation of allottees' descendants. *Ibid.*

The government's other cases (SG Br. 19-20) are equally inapposite because they involve estate or inheritance taxes. See *United States v. Mason*, 412 U.S. 391 (1973); *West*, *supra*; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Those taxes are "wholly different" for purposes of Indian tax immunity from "a state income tax on the income of a reservation Indian which was earned within the reservation." *Mason*, 412 U.S.at 396 n.7; *see West*, 334 U.S. at 727 (estate or inheritance tax "rests upon a basis different from that underlying a property tax").

Third, and in any event, this Court has pending before it multiple other petitions also presenting the disestablishment question. *See Dauggard v. Yankton*

Sioux Tribe, No. 10-929; *Southern Mo. Recycling & Waste Mgmt. Dist. v. Yankton Sioux Tribe*, No. 10-931; *Hein v. Yankton Sioux Tribe*, No. 10-932. Because the Osage's petition and the Tenth Circuit's decision best frame the legal question of how courts decide when congressional intent is clear, the better course of action would be to grant this petition and to hold or consolidate those other petitions. Alternatively, if the Court grants review in those cases, this petition should be held, with further disposition guided by the Court's ruling in those cases.

CONCLUSION

For the foregoing reasons, and those stated in the petition and the reply brief of petitioner, the petition for a writ of certiorari should be granted. In the alternative, if this Court grants review in *Dauggard v. Yankton Sioux Tribe*, No. 10-929, *Southern Missouri Recycling & Waste Management District v. Yankton Sioux Tribe*, No. 10-931, or *Hein v. Yankton Sioux Tribe*, No. 10-932, this petition should be held pending the Court's disposition of those cases.

Respectfully submitted,

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